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IN THE

Supreme Court of the United States

October Term, 1960

SAMUEL RENNY DAMON, HERMAN VON HOLT, DAVID HEBDEN PORTEUS, and JOHN EDWARD RUSSELL, Trustees under the will of SAMUEL M. DAMON, Deceased; LILLIAN TOM LOO; BEATRICE L. LUKE; KAN JUNG LUKE; FERMIN ABUCE; H. K. AHUNA; B. S. AKANA, et al.,

Petitioners,

vs.

Territory of Hawaii by HERBERT Y. C. CHOY, its Attorney General,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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vs.

Territory of Hawaii by HERBERT Y. C. CHOY, its Attorney General,

Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

PETITION FOR CERTIORARI

Review is sought of the judgment of the Supreme Court of the State of Hawaii dated and entered on March 13, 1961, in accordance with its opinion reported in 44 Hawaiian

[1] All the actions referred to were taken by the Territory of Hawaii prior to its admission as a state, and all judicial action was by territorial courts except the decision and judgment of the Supreme Court of the State of Hawaii of which review is sought. The heading of the original case is carried, although petitioners, whose names are listed in Note 1 of Appendix I, are the only remaining parties in the original action, and the State of Hawaii by its Attorney General, Shiro Kashiwa, is now the respondent.

Reports at page 557[2] under the provisions of Section 1257 (3) of Title 28 of the United States Code authorizing review of final judgments of the highest court of a state where rights have been specially set up or claimed under the constitution of the United States.

QUESTIONS PRESENTED

Is the principle of the common law that buildings are as much a part of the soil as are the rocks, sand and natural features entrenched in the concept of property protected by the Fifth Amendment so that the Territory of Hawaii cannot escape its constitutional obligation to compensate lessees for their buildings as an interest in the fee of land either,

a. by an order of the territorial trial court allowing amendments to a condemnation complaint, limiting the taking to the "fee simple absolute" estate of lessors and their reversionary rights, exclusive of lessees' interests and buildings which lessees own and/or have the right to remove, and judgment against lessees based thereon, declaring lessees entitled to no compensation; or

b. by an order of discontinuance entered by the territorial trial court while lessees' appeal from the order and judgment is pending before an appellate court and without notice or opportunity to them to be heard, and after the Territory has paid lessors estimated compensation and has been in possession of the land for more than a year?

2. If so, is property of lessees taken in violation of the due process and just compensation clauses of the Fifth Amendment by a judicial construction by the highest court of a state that such an order, or such a discontinuance, of the territorial trial court constitutes an abandonment of

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[2] Rehearing was denied February 20, 1961, and the mandate to the trial court was withheld pending certiorari by order dated March 9, 1961. The opinion of the court appears in Note 2 of Appendix I and the opinion on rehearing, the judgment and order staying mandate appear in Note 2 of Apprendix I which is separately bound and accompanies this petition.

condemnation proceedings as to lessees' interests in the fee where the effect of such judicial construction is to deprive lessees of a forum in state courts in which to have their right to compensation for the fee interest and the amount thereof determined?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provisions of the Fifth Amendment to the Constitution here involved are:

> No person shall . . . [nor] be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

The statutory law of the Territory of Hawaii on eminent domain is contained in Chapter 8 Revised Laws of Hawaii, 1955, as amended.[3]

STATEMENT OF THE CASE

In September, 1957, the 127 petitioners were lessees of land in the Damon Tract which the Territory of Hawaii brought suit to condemn for airport expansion. Petitioners, or their predecessors in interest, were lessees under a series of leases dating back to 1937 when the Damon Tract was first leased for houselots. These leases and the one in effect in September, 1957, reserved to petitioners the ownership of homes they had built on the land, the right to receive, upon condemnation, compensation payable for them, and the right to remove them upon the termination of their lease.[4] Litigation a year or more before condemnation was begun involving petitioners' asserted rights to long term leases of

[3] So far as relevant, these provisions are set forth in Appendix I, Note 3.

[4] Record, p. 130. The provisions of the lease relating to the ownership of buildings, duration and condemnation appear in Note 4 of Appendix I.

the land had resulted in a compromise agreement which provided in part that their lessors would not terminate their leases during any period of condemnation.[5] In the year condemnation was begun, the Territory had valued petitioners' homes as real property for a total of $327,077.00.[6]

The Territory in its complaint named petitioners parties defendant as lessees and occupants of the land being condemned. It alleged that it sought "the lands of the Damon Tract," but not petitioners "right and privilege of removal of the buildings and improvements which may be so removed."[7] After the entry of an *ex parte* order of possession of the parcels of land on which petitioners' houses stood, petitioners secured an order staying possession, and asserted in their objections that the buildings which they owned were an interest in the land taken and the Territory's action in seeking to condemn the land without payment to petitioners of compensation for their improvements

> "amounts to an appropriation of . . . property without due process of law in violation of the Fifth Amendment of the Constitution and in violation of . . . rights under said Amendment not to have their property taken except for public purposes and upon payment of just compensation. (R. p. 81)

Before the objections were heard, the Territory amended its complaint to include within the scope of the taking the improvements owned by the petitioners.

Petitioners' lessors moved to withdraw the whole sum deposited as its estimate of value of the land by the Territory upon the securing of possession. Over petitioners'

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[5] Record, p. 224. The provision of the agreement not to terminate is set forth in Note 5 of Appendix I.

[6] Record, pp. 100 and 173. Personal property is not taxed in Hawaii. Under existing tax practices at the time this valuation represented sixty *per cent.* of the fair market value of the improvements belonging to petitioners.

[7] Record, p. 40. Excerpts from the original complaint appear in Note 7 of Appendix I.

objections, the trial court permitted the Territory orally to amend all pleadings to state the value of the land as $3,585,999.00 and the value of all Petitioners' improvements as one dollar, and permitted the withdrawal by petitioners' lessors of all but one dollar of its deposit. Petitioners' objections to the trial court's allowing possession of parcels in which they had an interest without a deposit based on a *bona fide* estimate of value (R. p. 100) were overruled and on October 31, 1957, the stay order was vacated, and the Territory given possession under an order which read:

> 2. That the Plaintiff is hereby put in possession of all parcels of land herein sought to be condemned which are occupied by the defendants who made said Objections and Motion, together with all property rights of whatsoever nature and all improvements thereon, and with the right to collect all the rent from said occupants. (R. p. 111)

The trial court, on motion of petitioners' lessors, and over their objections, and the objections of the Territory, granted petitioners' lessors a separate trial upon lessors' representation in part that

> movants claim no interest in the improvements erected by defendant lessees and therefore have no interest in any compensation awarded therefore and that the trial of movants' claim along with the claims of lessees would result in inconvenience, delay and prejudice. (R. p. 150)

On January 13, 1958, petitioners filed their answer to the amended complaint setting up their ownership of the improvements attached to the realty on the date of the filing and the entry of the order of possession, and their demand to have a jury determine the just compensation required to be paid them for their interest in the land taken by the just compensation clause of the Fifth Amendment.[8] On the

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[8] Record, p. 172. Excerpts from the answer appear in Note 8 of Appendix I.

same day the Territory again moved to amend the designation of taking in its amended complaint to show it wished to take the parcels described "in fee simple absolute including the reversionary interests of the owners thereof, together with all interests of whatever kind and nature," subject, however, to the interests petitioners claimed as lessees and the improvements they owned and/or had the right to remove.[9]

Upon the entry of an order allowing these amendments over petitioners' objections, petitioners initiated a mandamus action against the trial judge for a writ directing him to vacate the order allowing amendments, asserting the action was tantamount to taking their property without the payment of just compensation required by the Fifth Amendment.[10] Upon denial of the writ by the territorial supreme court in a decision upholding the propriety of the trial judge's action on the ground that nothing was being taken from petitioners, petitioners appealed to the United States Court of Appeals for the Ninth Circuit, urging that the territorial supreme court had disposed of all constitutional issues on the merits adversely to petitioners and further appeals to territorial courts would be futile. That court denied relief saying the writ, under territorial law, was discretionary; the decision on constitutional issues, unneces-

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[9] Record, p. 155. The relevant text of the order amending the amended complaint and order of possession appears in Note 9 of Appendix I.

[10] Petitioners also sought vacation of a prior order of the trial court granting their lessors a separate trial on the ground that their ownership of the improvements was an interest in the land itself which they were entitled to have the same jury that fixed the value of the land apportion between them and lessors. As to this point the dissenting justice wrote: "Clearly the only trial that can be fair both to the Territory and to the various defendants is to proceed to the condemnation as a single proceeding with the jury under proper instructions valuing both the interest of the landlord and the several tenants." [Appendix II]

sary; and petitioners' remedy by appeal to the territorial supreme court, adequate.[11]

During the mandamus action, proceedings in the territorial court were held in abeyance. The Territory, however, continued in possession of the parcels of land of which petitioners' homes were an integral part and never thereafter actually relinquished it. After procuring the February 19, 1958, order purporting to let it take the fee subject to petitioners' leaseholds and ownership of improvements, the Territory appropriated rights under the leases by serving on all petitioners a notice which read:

> Notice of Termination of Lease
>
> To:
> Address:
> Premises Identified as Lot No.
>
> You are hereby notified that your tenancy on the above premises is terminated as of April 30, 1958. You will, however, be allowed to remain in possession until June 16, 1958, if Bishop Trust Company receives on or before May 1, 1958, prorata rental for the period from May 1 to June 16, 1958, computed upon the basis of your present rent, and you will be permitted, so long as you are not in default, to remove your improvements from the premises at any time prior to June 16, 1958. Any improvements on the premises thereafter will be considered abandoned.
>
> Very truly yours,
> TERRITORY OF HAWAII
> By .....[12]
> Assistant Attorney General

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[11] The texts of the territorial supreme court's opinion and that of the United States Court of Appeals in petitioners' companion mandamus action, Re Akana Application for Writ of Mandamus, 42 Haw. 415, 547, 261 F. 2d 773, are set forth in Appendix II which, with Appendix I, is separately bound and accompanies this petition.

[12] Record, p. 214a. To avoid the necessity of litigation to test the validity of this notice, petitioners entered into an agreement with the Territory preserving their right to challenge it without the necessity of litigation prior to the determination of their man-

On May 27, 1958, after the disposition of the mandamus proceeding, the Territory moved in the trial court for judgment on the pleadings and also sought an express determination there was no reason for delay and an express direction for the entry of judgment against petitioners on the ground that the court had ordered a separate trial against petitioners and there was no reason for delay.[13] Petitioners filed objections to the granting of the motion and sought summary judgment on the issue of liability. Their objections were on the grounds, among others, that the Territory could not constitutionally take the realty and evade paying compensation for the improvements by the devise of exclusion because they were a part of the realty; that the Territory was not entitled to a judgment finding petitioners entitled to no compensation, as payment for their improvements was required by the Fifth Amendment; that it appeared from the record that the Territory, while purporting to exclude the interests of petitioners, had in fact taken them and had assumed to exercise rights under petitioners' leases by giving notice of termination and directing petitioners to exercise their privilege under the leases of removing their improvements or forfeiting them to the Territory; and that even if petitioners were determined not to be entitled to compensation for their improvements as they stood on the land and could be required to remove them, they nevertheless would be entitled to compensation for the difference between the value of the improvements as they stood on the land and their value when severed from the land.[14] The trial court granted the Territory's motion for judgment on the pleadings and denied

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damus action or by appeal. Neither this agreement, nor a subsequent notice of termination given November 17, 1958 by territorial officials to such of petitioners as were still in occupation under the terms of the agreement, were part of the record before the State Supreme Court.

[13] Record, p. 198. Relevant excerpts appear in Note 13 of Appendix I.

[14] Record, pp. 203-205. Relevant excerpts appear in Note 14 of Appendix I.

petitioners motion for summary judgment on the issue of liability by an order which read in part:

> This cause having come on to be heard on plaintiff's motion for judgment on the pleadings against the defendants hereinafter named, and it appearing to the Court that said defendants are entitled to no compensation or damages by reason of the taking in this proceeding inasmuch as the pleadings affirmatively show that no interest of said defendants is being condemned.
>
> IT IS ORDERED that judgment be entered against the defendants hereinafter named on the pleadings, finding said defendants entitled to no compensation or damages by reason of this condemnation.
>
> . . . . .
>
> The motion of defendants . . . for summary judgment on the issue of liability is denied. R. pp. 233-236

On June 18, 1958, petitioners perfected an appeal to the territorial supreme court, assigning as error the above stated grounds urged in opposition to the granting of judgment against them.[15]

In the meantime the separate jury trial to determine just compensation to petitioners' lessors began, and, after several days of trial, the court entered an order approving a stipulation of the Territory and petitioners' lessors and discharging the jury.[16]

On October 8, 1958, during the pendency of petitioners' appeal, the territorial attorney general presented to the

[15] Excerpts from petitioners' specifications of error on appeal appear in Note 15 of Appendix I.

[16] This stipulation, dated July 28, 1958, had attached to it an agreement that in forty-five days the Territory would pay petitioners' lessors $1,361,001 in addition to the $3,585,999 they had already withdrawn from the court in return for a deed covering their interest in the land free and clear of encumbrances other than petitioners' leaseholds, and assign to them all rentals collected by the Territory to the date of the deed, after which the Territory would discontinue the proceeding. The stipulation, order and agreement were not part of the record on appeal and were *ex parte* as to petitioners.

trial court a document entitled "Discontinuance" which read:

> Comes now the Territory of Hawaii, plaintiff above named, by Herbert Y. C. Choy, its Attorney General, and discontinues the above entitled proceeding, and consents to the vacation of the Order of Possession heretofore entered.
>
> Dated: Honolulu, Hawaii, this 8th day of October, 1958.
>
> TERRITORY OF HAWAII
> By Herbert Y. C. Choy
> Attorney General

The document was signed by petitioners' lessors indicating their consent to its entry. The trial judge on the same day entered the following order:

> The Territory of Hawaii having presented its discontinuance of the above-entitled proceedings, *said proceedings having been previously discontinued as to all defendants other than those hereinafter named by Order Amending Amended Complaint and Amending Order Putting Plaintiff in Possession filed February 19, 1958, and Judgment on the Pleadings with respect to the defendants other than those hereinafter named having been filed herein on June 12, 1958*, and defendants K. J. Luke, Beatrice Luke and Lillian Loo and the Trustees of the Estate of Samuel M. Damon, Deceased, having consented to the discontinuance of the above-entitled proceedings and the vacation of the Order of Possession and having waived any claim for compensation or damages by reason of such discontinuance, and good cause appearing therefor,
>
> IT IS HEREBY ORDERED THAT said discontinuance is hereby allowed and the Order of Possession, as amended, heretofore entered herein, is hereby vacated.
>
> DATED: Honolulu, Hawaii, October 9, 1958. [*Italics supplied*]

The document shows the approval of petitioners' lessors.

The Territory attached to the reply brief it filed January 23, 1959 in petitioners' appeal, taken June 18, 1958, from

the judgment finding them entitled to no compensation the discontinuance it subsequently secured from the trial court without prior notice or opportunity to petitioners to be heard, urging that court to declare petitioners' appeal mooted thereby. On September 13, 1960, the Supreme Court of the State of Hawaii so held in an opinion by Mr. Justice Marumoto, the same justice who, as justice of the territorial supreme court, had written the opinion of the divided court denying petitioners' writ of mandamus, approving the propriety of the trial court's order permitting exclusion of petitioners' interest in the fee, and holding the order of exclusion constituted an abandonment of the condemnation proceedings. In the mandamus opinion, Mr. Justice Marumoto said of petitioners' assertion that the trial court's order permitted the taking of their property without just compensation in violation of the Fifth Amendment:

> The petitioners lost nothing by the allowance of the last amendment to the complaint. Their property is not taken. The Territory amended the complaint because it decided not to take the petitioners' property . . They complain that the allowance of the amendment takes away from them the right to just compensation for the buildings which they could have claimed if the Territory proceeded to take the entire interest in the land in accordance with the complaint as first amended on October 26, 1957. Neither the requirement of just compensation under the Fifth Amendment nor the provisions of our statutes governing eminent domain proceedings prevent the Territory from withdrawing, before the right became vested in the petitioners, any advantage which it unwittingly gave them.'
>
> The presiding judge properly allowed the amendment. After the allowance of the amendment the petitioners are not concerned with the trial of the issues relating to the compensation for the taking of the fee simple title, subject to their interests, and they are not deprived of their rights by a separate trial granted to Lillian Tom Loo, Kan Jung Luke and Beatrice L. Luke.

> The petition for a writ of mandamus is denied. [Appendix II]

The late Mr. Justice Stainback, dissenting justice of the same court,[17] denied there was any genuine abandonment, saying:

> If we are to apply equitable principles to "just compensation" (Fifth Amendment to the Constitution of the United States) we must take the substance rather than the form. The majority opinion states that the only recourse the petitioners would have would be for abandonment and not for compensation for the taking of their interests. This would be true if there were a bona fida abandonment. Obviously there was none. By first abandoning its original taking including all the lands and its subsequent retaking, the Territory attempts to deprive the tenants of an accrued right by a flimsy technicality . . .
>
> If we start with the indisputable proposition that improvements placed upon land become a part thereof, and the Territory instituted a proceeding to condemn "the lands of the Damon Tract adjacent to the airport," it became obligated to pay the full value thereof as of the date of the summons; this would include the improvements thereon.
>
> . . . . .
>
> Conceding that the government may, upon payment of just compensation, take less than the fee simple, in the present case it did not do so; in fact, very obviously it had no intention to take less than the fee simple. Under the resolution of the Hawaii Aeronautics Commission the attorney general was authorized and did bring a

[17] Justice Stainback was formerly United States District Attorney, United States District Judge for the District of Hawaii and Governor of the Territory of Hawaii. The Damon estate was one of the large estates to which his comment as to landholding in Hawaii referred. His comment that lessors "do not trust a jury as between landlord and tenant—and the Territory has joined with them by depositing with the court one dollar as the value of lessee's interest" is given meaning by the brief history of the Damon Tract set forth in Note 17 of Appendix I.

> suit to condemn "the lands of the Damon Tract adjacent to the airport, delineated on the map." It may not use a "device" to escape payment of just compensation, namely, the value of the land taken which included all improvements thereof.
>
> . . . . .
>
> As pointed out in case after case, the obligation of the government to pay "just compensation is not affected by how the "just compensation" may be divided between landlord and tenant (see cases supra). Any other construction would result in depriving tenants of the property without due process of law and would be a complete disregard of the equitable principles governing compensation in eminent domain. [Appendix II]

Petitioners' appeal raised the identical question decided adversely to them by the territorial supreme court in their mandamus action, the only difference being the procedural one that the appeal was taken from a final judgment determining they were entitled to no compensation. Why the court did not affirm the decision of its predecessor court rather than declining to reach the merits of the appeal can only be surmised. The same result was achieved as to petitioners when the court refused to decide their appeal because of the entry of a discontinuance following a judgment based upon its former determination that nothing was taken from petitioners under the amended complaint.

Petitioners sought rehearing on the ground there was no real abandonment of the condemnation of the land in which petitioners claimed an interest in the fee, but rather that a discontinuance was employed by the Territory instead of the appropriate judgment in condemnation limited to the interest of petitioners' lessors — as to whom the effect of either was identical — because the Territory hoped thereby to deprive petitioners of determination that an interest of theirs had, in fact, been taken, despite the exclusionary language of the second amended complaint. Petitioners further urged that the court's holding that petitioners' appeal was made

moot by a discontinuance by the trial court entered after the perfection of their appeal, without notice or opportunity to them to be heard, deprived them of procedural due process and the right to a forum in which to determine whether an interest of theirs in the land had been taken for which just compensation was required by the constitution to be paid. Rehearing was denied and judgment dismissing petitioners' appeal entered May 13, 1961. (R. pp. 28 and 33)

REASONS FOR GRANTING THE WRIT

This Court has never decided the important constitutional question of whether a sovereign, exercising the power of eminent domain, may take a fee in land from a lessor without paying just compensation to a lessee whose buildings are part of the land and whose value is destroyed by the taking. That a lessee's contract right to remove buildings at the end of his term does not inure to the benefit of the condemnor has long been regarded as settled by the decisions of lower federal courts and state courts and is treated as Horn-book by textwriters.[18]

In an opinion by Mr. Justice Holmes this court in *Duckett & Company v. United States*, 266 U.S. 14, 69 L. ed. 216,

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[18] *United States v. Seagren*, 50 F (2d) 333, 335 (C.A.D.C. 1931);
Nichols on Eminent Domain (2d Ed), Vol. 1, § 234;
Lewis on Eminent Domain, 3d ed., Vol. 2, p. 1276;
Jackson v. State, 213 N. Y. 34, 106 N.E. 758;
In re Appointment of Park Commissioners, 1 N.Y.S. 763;
In re New York 120 App. Div. 700, 105 N.Y.S. 779;
State v. Miller, 92 S.W. (2d) 1073, 1074;
St. Louis v. Senter Commission Co., 336 Mo. 820, 82 S.W. (2d) 87;
City of Larue v. St. Louis Public Service Co., 168 S.W. (2d) 966;
Minneapolis-St. Paul Metropolitan Airports Commission v. Hedberg-Freidheim Company, 226 Minn. 282, 32 N.W. (2d) 569;
Cumbaa v. Town of Geneva, 235 Ala. 423, 179 So. 227.
See also *Monongahela Navigation Company v. United States*, 148 U.S. 312, 37 L ed. 465; *Burkhart v. United States*, 210 F (2d) 602 and 227 F (2d) 659; *United States v. Honolulu Plantation Company*, 182 F (2d) 172, 174.

applied the just compensation requirement of the Fifth Amendment to a temporary appropriation without benefit of legal proceedings and required the federal government to pay a lessor the value of his leasehold which had been destroyed, despite a claim by the government that it had made an agreement with and paid the lessor for lessee's rights. Invoking as a comparison the taking of a fee, Mr. Justice Holmes wrote:

> Ordinarily an unqualified taking in fee by eminent domain takes all interests; and, as it takes the *res*, is not called upon to specify the interests that happen to exist. Whether or not for some purposes the new takers may be given the benefit of privity with the former holders, the accurate view would seem to be that such an exercise of eminent domain founds a new title and extinguishes all previous rights . . . In such a case we no more should expect to hear it argued that leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun. A right may be taken by simple destruction for public use.

In *United States v. General Motors*, 323 U.S. 373, 384 89 L. ed. 311, this court cited with approval as an apt analogy to the facts presented, *United States vs. Seagren*, 60 App. DC 183, 50 F. (2d) 333, a case on all fours with petitioners', and the leading circuit court of appeals decision upholding a lessee's right to compensation for buildings as an interest in the fee. In the *General Motors* case this court, in denying that the government could take temporary occupancy from a lessee of a portion of a long term lease and require the lessee to remove his fixtures, and yet pay only rent at the long term rate, said:

> If the Government need only pay the long-term rental of an empty building for a temporary taking from the long term tenant a way will have been found to defeat the Fifth Amendment's mandate for just compensation in all condemnations except those in which the con-

templated public use requires the taking of the fee simple title. In any case where the Government may need private property, it can devise its condemnation so as to specify a term of a day, a month, or a year, with optional contingent renewal for indefinite periods, and with the certainty that it need pay the owner only the long term rental rate of an unoccupied building for the short term . . . And this, though the owner may be damaged by the ouster ten, a score or perhaps a hundred times the amount found due him as "fair rental value." . . . If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing "just compensation" into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of "value received" in that of contractual consideration.

In *Jackson v. State*, 213 N. Y. 34, 106 N. E. 758, Judge Cardozo upheld the right of an owner to be compensated for trade fixtures which were attached to the realty, saying:

> It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of second hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were to forfeit all these elements of value.

On September 13, 1957, the date of summons of the complaint to acquire the fee which, under territorial law, is the date as of which rights to compensation and amounts of compensation are determined, petitioners' buildings were part of the fee. They were part of the land when the Territory took possession of it on October 31, 1957, and the Territory never thereafter relinquished possession of the land in

fact. Only by a recital in the "voluntary discontinuance" it presented to the trial court on October 9, 1958 did the Territory "consent to the vacation of the order of possession." The trial judge ordered the discontinuance entered, reciting that the proceedings had already "been previously discontinued [sic]" as to petitioners by his former order permitting their interests and improvements to be excluded from the taking of the fee simple absolute title and granting judgment against them on the ground nothing was being taken from them. This judgment, which was then on appeal, was based on the territorial supreme court's decision in the mandamus action upholding the propriety of the amendment and characterizing it as an abandonment of condemnation as to petitioners. The circle was compassed when the state supreme court relied on the trial court's discontinuance as mooting petitioners' appeal making it unnecessary for it to decide the validity of the judgment against petitioners on which the subsequent discontinuance was based.

Separate settlements with lessors in *Duckett & Company v. United States*, *supra*, and *United States v. Seagren*, *supra*, were held not to satisfy Fifth Amendment claims of lessees for leaseholds or buildings which were part of the land. Yet by a series of procedural maneuvers petitioners' homes have been taken from them without just compensation and they have been left in no better position than the unfortunate squatters on the flooded battures of New Orleans.

Petitioners have been deprived of the security with which the Fifth Amendment surrounds the property of citizens by a judicial construction and course of conduct of the highest court of Hawaii which robbed the amendment of substance and reduced its quality to mere form and technicality. In the State of Hawaii, not yet freed from a semi-feudal land owning system, most of its home-owning citizens of all economic levels are lessees of their homes. To their insecurity as lessees has now been added the danger of losing, upon eminent domain, the benefit of provisions negotiated

for the protection of their investment in their homes. In this age of corrupted standards of public office, public officials, by merely choosing to reach settlements with large landowning estates or lessors, can reduce the rights of lessees to rubble. Home-owning lessees are not, however, the only class of threatened victims. The scythe here forged cuts a wider swath. Industrial and agricultural lessees can fall before it.

By selective language, by pulling back "the moving finger" and rubbing out events that happened and relabelling them the Territory contrived a device which the highest court of the State of Hawaii has held dispositive of petitioners' right to have their constitutional claim heard.

Petitioners urge a writ should be granted for the reason this court has never decided, and should decide, the constitutional issue which petitioners have set up and specially claimed in every court at every stage of every proceeding—in the territorial trial court, the territorial Supreme Court, the United States Court of Appeals and the Supreme Court of the State of Hawaii; for the reason petitioners have been denied a forum in state courts in which to enforce their rights; for the reason the question presented is an issue of importance to other lessees in the State of Hawaii, as well as petitioners, and important to all lessees everywhere; and for the reason that the refusal of the highest court of Hawaii to decide petitioners' claim leaves standing as binding precedent the decision against petitioners' rights to just compensation for their homes of its predecessor territorial court in the mandamus case which is probably in conflict with applicable, analogous decisions of this court, defining the scope of the basic protection given the property of citizens by the due process and just compensation clauses of the Fifth Amendment.

Respectfully submitted,

HARRIET BOUSLOG
Attorney for Petitioners

PROOF OF SERVICE

I, Harriet Bouslog, attorney for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of June, 1961 I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Hawaii by depositing the same in the United States Post Office in the City and County of Honolulu, State of Hawaii, addressed to its counsel of record as follows:

Shiro Kashiwa, Attorney General, Old Archives building Iolani Palace Grounds, Honolulu, Hawaii

Andrew S. O. Lee and Walter T. Shimoda, Deputy Attorneys General, Old Archives Building, Iolani Palace Grounds, Honolulu, Hawaii

John P. Russell, Special Deputy Attorney General c/o of Attorney General, State of Hawaii, Old Archives Building, Honolulu, Hawaii

HARRIET BOUSLOG
Attorney for Petitioners